NO. 21352

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EUGENE RICHARD CHURCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in three counts of a four-count indictment, following trial by jury upon two counts and trial without a jury upon one count.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 1407, 3231, and 3238, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

Appellant was charged in three counts of a four-count indictment. Count One alleged that Louise Harriet Horne knowingly imported and brought approximately 1-1/2 ounces of heroin, a narcotic drug, into the United States from Mexico, and that appellant and defendants Clarence Edward Church and Robert J. Ray knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 2].[1]

Count Two alleged that Louise Horne knowingly concealed, and facilitated the transportation and concealment of, approximately 1-1/2 ounces of heroin, a narcotic drug, which, as they then and there well knew, had been imported and brought into the United States contrary to law, and that appellant and defendants Clarence Church and Ray knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 3].

Appellant was not charged in Count Three, which alleged that Clarence Church entered the United States without registering under 18 U.S.C. 1407 [C.T. 4].

Count Four alleged that appellant entered the United States without registering under 18 U.S.C.A. 1407, being a citizen of the United States who had previously been convicted of possession of marihuana [C.T. 4].

Appellant was convicted in a trial which ended on August 12, 1965. On September 7, 1965, appellant was found to be insane and to have been

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[1] "C.T." refers to Clerk's Transcript of Record.

insane and unable to assist in his defense at the time of trial, his conviction was set aside, and he was committed to Springfield. Appellant was later determined to be sane and was returned for trial [R.T. 8, 36, 159-60][2]. Appellant was at Springfield for less than five months [R.T. 344-45].

Appellant waived the right of trial by jury upon Count Four [C.T. 6]. His court trial upon this count occurred simultaneously with his second jury trial [R. T. 29-30]. The second jury trial (and court trial) of appellant commenced on May 26, 1966, before United States District Judge James M. Carter [R. T. 2]. Appellant was found guilty as charged upon Counts One and Two on June 3, 1966. He was also found guilty by the Court upon Count Four [C. T. 7-8].

Thereafter, on July 5, 1966, appellant was sentenced to prison for five years upon Count One, five years upon Count Two, and two years upon Count Four, the sentences upon Counts Two and Four to run concurrently to the sentence upon Count One [C.T. 8].

Appellant subsequently filed a timely notice of appeal [C.T. 14].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged error in following the Ninth Circuit's law of insanity in the instructions to the jury.

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[2] "R.T." refers to the Reporter's Transcript of Proceedings.

2. Alleged error in denying motions relating to sufficiency of the evidence.

3. Alleged error in the Court's questioning of a witness.

4. Alleged error in the Court's comment to the effect that appellant had a right to testify.

5. Alleged error in failing to call Dr. Robuck as a witness.

IV

STATEMENT OF THE FACTS

On March 22, 1965, Miss Louise Harriet Horne had a conversation in Los Angeles, California, with appellant and Clarence Church. Appellant and Clarence Church said that they had to get some "stuff." "Stuff" was the term which they used for "heroin." Clarence Church asked Miss Horne to go to Mexico and said that she would be paid for driving [R.T. 52, 58-59].

Miss Horne left Los Angeles on that date and rode to Tijuana, Mexico, in Clarence Church's 1964 Cadillac automobile. Appellant, Clarence Church, and Robert Ray also participated in the trip [R.T. 52-53, 152-53]. Clarence Church and appellant are brothers. Ray was a brother-in-law of both [R.T. 53-54, 69].

Miss Horne was 19 years of age and had never used heroin. Appellant was 27, Ray was 28, and Clarence Church was 32 [R.T. 53, 77, 305]. Miss Horne drove the vehicle until they approached the international border. Appellant drove the vehicle across the border and they went to the jai alai place, where appellant left the vehicle and returned with heroin. Then Clarence Church and appellant went to a drugstore, where a syringe was

purchased. Since there was no needle available for purchase, they went to another drugstore, where some needles were purchased [R.T. 54-56, 103-04].

They subsequently went to a motel and the three men went inside and left Miss Horne in the car. When they returned, appellant handed an item to Miss Horne and told her to keep it [R.T. 55, 61-62]. Appellant and Clarence Church had a discussion concerning the quality of the heroin, and appellant agreed to take it back [R.T. 56-57].

They returned to the jai alai location, where appellant left the vehicle with the packages. The other three remained in the vehicle. After a long wait, appellant returned with a package. It was stipulated that the package, which consisted of a rubber contraceptive and contents, contained 42.3% heroin [R.T. 50-51, 62-63].

Appellant and Clarence Church had an argument. Appellant did not want Clarence Church to know that half of the material was his. Appellant gave the contraceptive to Miss Horne and told her that she knew where to put it. Clarence Church gave her a syringe. She went to the ladies' room in a service station and placed the contraceptive in her body cavity [R.T. 63-64].

She knew where to put it because she had conferred with one Lorraine, a sister of Clarence Church and appellant, and also because Clarence Church had advised her regarding the matter. Miss Horne had also participated in a previous trip to Tijuana involving appellant, Clarence Church, Lorraine, and two other girls [R. T. 69, 92, 111].

After Miss Horne placed the contraceptive in her body cavity, all four of them crossed into the United States by automobile with Clarence

Church driving. Appellant and Clarence Church had an argument over financial matters during the trip. They entered the United States at San Ysidro, California. Miss Horne had the package. No narcotics were declared to the Customs inspector [R.T. 65, 97, 145-46].

The Customs inspector had received information that some occupants of the vehicle had entered a drugstore and that it was believed that they had purchased pills or illicit medicine. The vehicle was referred to the secondary inspection area. The heroin package was obtained from Miss Horne by a physician [R.T. 148-49, 164].

United States Customs Agent Arnie W. Lohman questioned appellant, Eugene Richard Church, who stated that his name was "James Harris," that he had never used any other name, that he had known Clarence Church for approximately five years, and that he had never been arrested upon any charge. He also said that he had never had anything to do with narcotics [R.T. 115-17].

Appellant had been arrested two months earlier in the Los Angeles area. This incident occurred on January 22, 1965, after appellant entered a 1965 Cadillac with no license plates, drove for awhile, and was contacted by Los Angeles narcotics officers, who attempted to serve a search warrant for search of his person. This attempt resulted in a high-speed pursuit for approximately 2-1/2 miles at approximately 70 or 80 miles per hour. Appellant drove "through" four or five red lights during the chase. After appellant was stopped, a package containing a powdery substance was found upon the floor of the vehicle that he had been driving, on the driver's side [R.T. 166-68,

172, 177]. An expert witness testified that the package contained 22.3 grams of heroin. There was testimony concerning the "chain of possession" of the exhibit [R.T. 173-74, 183-85, 188-91].

Dr. Allan R. Schrift, formerly the Division psychiatrist for the First Marine Division, testified that in his opinion appellant was probably legally sane in March 1965, and legally insane on August 24, 1965, the date of the examination. The offense occurred on March 22, 1965 [R.T. 145, 392, 394-96].

Dr. Schrift also testified that appellant and his wife both stated that appellant had a nervous breakdown in 1962, which "cleared gradually." They also told him that "there was no evidence of any problem about the time of the alleged crime," that appellant fell and injured his head in June, 1965, and that since that time, he had gone steadily downhill.

Appellant told Dr. Schrift that he had used heroin and marihuana in the past and might have been using one of these drugs at the time of the alleged crime [R.T. 395-96].

Dr. William D. Kinnon, a psychologist, was called as a defense witness. He testified that he examined appellant about three weeks before he testified (i.e., about three weeks before June 1, 1966), that appellant had a type of mental disorder known as schizophrenia, and that there was not enough evidence for him to determine appellant's condition on a date in the past [R.T. 246-47, 251, 258, 266]. Dr. Kinnon also testified that legal insanity is a legal term rather than a medical term; that a schizophrenic may be in a state of remission or in a psychotic state; and that when he is in a

state of remission he is apparently sane [R.T. 264, 266].

Appellant also called Dr. George W. Hollinger, a psychiatrist, as a witness. Dr. Hollinger concluded that appellant "was most probably insane" at the time of the offense [R.T. 339, 367]. However, he did not observe appellant until April 26, 1966. The alleged offense occurred on March 22, 1965 [R. T. 145, 343]. Dr. Hollinger admitted that he would not know appellant's condition on March 22, 1965, unless he relied upon statements made by appellant and appellant's wife:

"Obviously unless I had been there, I would not know." [R.T. 374].

Dr. Hollinger also testified that insanity is a legal term. He testified that appellant told him that he had used marihuana and various pills, such as "goofballs" and Dexedrine, and that Mrs. Church stated that appellant had taken "all kinds of pills" and had used heroin prior to the arrest. He also testified that many kinds of medications might cause persons to stare into space [R.T. 363, 367-69].

Mr. George Sprow testified that he lived next door to appellant and had observed appellant staring into space at a barbecue in mid-March 1965. He also testified that appellant spent most of his time in pajamas [R.T. 308-10].

Clarence Church testified concerning appellant's mental problems approximately in 1961, as well as some events in 1964 and 1965, including telephone calls by appellant at unusual hours and staring into space [R.T.234-244]. He also testified that appellant had been a professional rock and roll singer who had a "hit," "close to a million seller." [R.T. 230-31].

Clarence Church also testified that he had made previous trips to Mexico with Miss Horne to obtain heroin and that Miss Horne knew how much heroin that she could carry in her cavities [R.T. 300-01]. He testified that he himself paid the money for the heroin to a man living in Mexico. Probation Officer Victor W. Sharp testified that Clarence Church had told him that he, Clarence, gave his brother (appellant) $350 to buy the heroin, and that his brother later returned to the narcotic peddler because the quality of the heroin was inferior. Clarence Church testified that he did not make these statements [R.T. 143-44, 155-56].

Appellant's wife testified that appellant had a mental problem in 1961. She also testified concerning a possible suicide attempt, suicide threats, before or after the date of the offense, long discussions, late hours, staring, and other matters [R.T. 316, 320-33]. She also testified concerning the reason for appellant's use of the "James Harris" name [R.T. 328].

Agent Lohman testified that on the date in question, appellant was very lucid and appeared to be normal in every way. There was no objection to this testimony [R.T. 116, 118]. Agent Lohman later testified over objection that persons under the influence of marihuana are very unresponsive and that "They stare off into space and you don't seem to get through to them . . . . They seem to be off in another world." He also testified that certain pills cause similar reactions [R.T. 386-87].

When the Court asked Government counsel whether he would stipulate that Dr. Robuck's report go into evidence, Government counsel agreed to do so "if the jury is informed that he is a defense witness." Counsel

for appellant refused to stipulate and requested that the Court call Dr. Robuck as the Court's witness [R.T. 206-07, 209].

In connection with the trial upon the charge of failing to register, it was stipulated that appellant was a citizen of the United States who entered the United States from Mexico without registering, having been previously convicted of possession of marihuana under Section 11500 of the California Health and Safety Code [R.T. 214-15].

V

ARGUMENT

A. INSTRUCTIONS BASED UPON THE NINTH CIRCUIT LAW OF INSANITY DID NOT CONSTITUTE ERROR.

The trial Court's instructions to the jury upon the question of insanity were based upon the M'Naghten rule [R.T. 483].

These instructions were proper.

Sauer v. United States, 241 F.2d 640 (9th Cir. 1957), cert. denied, 354 U. S. 940 (1957);

Smith v. United States, 342 F.2d 725 (9th Cir. 1965).

Appellant contends that the law of insanity should be changed. This Court has already answered that contention: "If change there is to be, it must come from a higher judicial authority, or from the Congress."

Sauer, supra, at p. 652.

Appellant cites a number of cases, including United States v. Currens 290 F.2d 751 (3rd Cir. 1961), and Wion v. United States, 325 F.2d 420 (10th Cir. 1963). Wion rejects the criminal insanity test employed in Currens (at

p. 427).

Appellant also suggests that the Model Penal Code test of insanity be substituted for the M'Naghten rule. Appellant favors the following test:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."
>
> (Appellant's Opening Brief, pp. 1-2).

The terms, "disease" and "defect," play a critical role in the proposed test. This Court has discussed these vague terms with evident lack of approval.

Sauer, supra, at p. 646.

Unless the terms in the Model Penal Code test are carefully and narrowly interpreted, the results would be phenomenal, to say the least. A typical marihuana smuggler could argue that as a result of mental defect (i.e., hostility to society, resulting from hatred of his father), he is "unable to conform his conduct to the requirements of law." The criminal whose urge to inflect pain causes him to assault and maim helpless victims also could probably find psychiatric support for the proposition that he is "unable" to conform his conduct to the requirements of law. The narcotics addict-peddler could also find the Model Penal Code test quite helpful. While neurosis, which presumably is a mental defect, probably plays a major role in most serious crimes, the Model Penal Code does not provide a satisfactory guide

for the disposition of cases involving the ordinary neurotic criminal.

The American Law Institute apparently attempted to meet this obvious problem by suggesting that "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. Currens, supra, p. 774, n. 32. This apparently allows the typical neurotic offender one or more "free" crimes, an immunity that lasts until the neurosis leads to "repeated criminal or otherwise anti-social conduct." The objections to such a rule are self-evident.

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

Appellant contends that the Government did not prove beyond a reasonable doubt that appellant was sane at the time of the offense.

In considering this question, it is helpful to analyze the slight and unconvincing evidence offered by appellant in the effort to indicate that he was insane. Dr. William Kinnon, a psychologist, testified that there was not enough evidence for him to determine the issue of sanity at the time of the offense [R.T. 246-47, 266]. The basis for this conclusion is evident from Dr. Kinnon's testimony. At any given time, appellant could be in a state of psychosis or in a state of remission (i.e., normalcy or sanity). [R.T. 258-59, 266]. Since Dr. Kinnon examined appellant about three weeks before he testified (i.e., about three weeks before June 1, 1966) [R.T. 251] he did not examine appellant until more than a year after the date in question (March 22, 1965). He clearly had no means of determining whether appellant

was psychotic or in a state of remission (sanity) on the date of the offense.

Dr. George W. Hollinger, a psychiatrist, was the only other expert witness called by appellant. He concluded that appellant "was most probably insane" at the time of the offense [R.T. 339, 367]. However, he did not observe appellant until April 26, 1966 [R.T. 343], more than 13 months after the date of the offense. With considerable reluctance, Dr. Hollinger finally admitted the obvious fact that he would not know whether appellant was in a state of remission (i.e., sanity) on the date of the offense unless he relied upon the statements of appellant and appellant's wife [R.T. 374]. Consequently, his opinion would have been of no value if appellant and his wife were not telling the truth. There is every indication that they were not telling the truth. Appellant and his wife both told Dr. Allan R. Schrift that appellant recovered from a nervous breakdown that occurred in 1962, that "there was no evidence of any problem about the time of the alleged crime," and that appellant fell and hit his head in June 1965 (after the crime) and went steadily downhill after the injury [R.T. 395-96].

It was evident that Dr. Hollinger's opinion was based upon a belief that appellant was truthful when he apparently told Dr. Hollinger that he did what he did no March 22, 1965, thinking "that was the way to salvation for brother and ultimately for him." [R.T. 360]. In Carpenter v. United States, 264 F.2d 565 (4th Cir. 1959), the experts' conclusion of temporary insanity "was clearly founded upon their assumption of the truth of Carpenter's description of his emotions and the events after he had left the tavern." (at p. 570).

The Court of Appeals stated:

"If the facts were not what the doctors supposed, their opinions were baseless and of no evidentiary value." (at p.570).

In Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), a similar situation existed in regard to statements made to a psychiatrist by one Patricia Scott, a friend of the defendant. The Court of Appeals stated:

"If the jury felt, as it could, that Scott's testimony was not true, the very foundation for Dr. Waitzel's opinion disintegrates." (at p. 412).

Appellant presented the testimony of three lay witnesses, including his brother and his wife. His brother testified concerning appellant's mental problems approximately in 1961 and also some events in 1964 and early 1965, the latter primarily involving telephone calls by appellant at unusual hours and staring into space [R.T. 234-44] . The brother's testimony concerning the events of March 22, 1965, was completely inconsistent with his previous statement to Probation Officer Victor W. Sharp [R.T. 143-44, 155-56] .

Appellant's wife testified that appellant had a mental problem in 1961, and also testified concerning a possible suicide attempt, suicide threats before or after the date of the offense, long discussions, late hours, staring, and other matters [R.T. 316, 320-33] . Her testimony was completely inconsistent with her previous statements to Dr. Schrift [R.T. 333-34, 395-96].

Appellant's other lay witness was a neighbor, George Sprow, who testified that he saw appellant staring into space at a barbecue in mid-March 1965. He also testified that appellant spent most of his time in pajamas [R.T.

309-10].

Agent Lohman testified that staring into space was a symptom of being under the influence of marihuana: "They seem to be off in another world." [R.T. 386-87].

Appellant minimizes Agent Lohman's testimony because he was a lay witness. However, testimony by laymen regarding the issue of sanity has been accepted by the courts, even where the witness apparently observed the subject for only a brief period of time. In Evalt v. United States, 359 F.2d 534, 547 (9th Cir. 1966), this Court upheld the use of lay testimony concerning sanity where the three testifying officers had had considerable contact with insane persons. Agent Lohman had had experience with insane suspects [R.T. 133]. Appellant's counsel suggested that laymen such as Agent Lohman have experience in observing "people in various conditions" and asked for his impressions in regard to the matter [R.T. 132-33].

Considering the fact that there was expert psychiatric testimony to the effect that appellant was sane at the time of the offense, and that the testimony of the only expert witness claiming that appellant was insane rested upon the quicksand foundation of the self-serving statements by appellant and his wife, which statesments were completely discredited by their contradictory statements to Dr. Schrift, it is respectfully submitted that the evidence of sanity was sufficient, viewed in the light of the well-established rule that the evidence upon appeal is considered in the view most favorable to the prevailing party in the trial court.

C. THE COURT'S QUESTIONING OF A WITNESS DID NOT CONSTITUTE ERROR.

Appellant contends that the trial Court committed prejudicial error because a question asked of a witness allegedly would cause the jurors to believe that an acquittal would result in appellant's release from custody.

Disregarding the remarkable proposition that telling the jury the truth concerning their verdict (i.e., that acquittal would mean freedom) could constitute error, it is respectfully submitted that the question did not prejudice appellant. The question was as follows:

> "THE COURT: Is a schizophrenic who has the high manic reaction the more dangerous person than one who does not have the manic showing?" [R.T. 348-49].

The question was not answered, as the objection was sustained [R.T. 349]. However, it would appear that the question was highly material, in view of the evidence regarding the wild high-speed chase of appellant in the Los Angeles area.

At any rate, the jurors were instructed that "Any evidence to which an objection has been sustained shall be disregarded ...." [R.T. 470].

There was no motion for a mistrial [R. T. 349].

D. THE COURT'S COMMENTS CONCERNING THE RIGHT OF APPELLANT TO TESTIFY DID NOT CONSTITUTE ERROR.

During the trial appellant attempted to produce his defense by hearsay testimony without subjecting himself to cross-examination. The trial judge

sustained an objection to this improper procedure and noted that appellant had the right to testify but could not testify through third persons [R.T. 353] .

Appellant contends that this remark constituted error. It is respectfully submitted that the jurors were told no more than they already knew. In many cases, a trial in which a criminal defendant is prohibited from testifying would be a farce, not a trial. It should not be lightly assumed that jurors are entirely lacking in common sense.

Furthermore, the trial Judge had every reason to believe that appellant would testify later during the trial. Appellant's counsel had implied during cross-examination of Miss Horne that certain facts had occurred:

"Q Wasn't it the plan between you and Clarence for you to take this heroin, go across the border on foot and meet him either after, in the Grant Hotel or back in Mexico after you transported it?"

"A No, this is not true." [R.T. 109] .

Since appellant's other witnesses did not testify concerning this alleged scheme, the Court could assume that appellant intended to testify.

Appellant's counsel apparently did not consider the Court's remark to be very serious, because there was no objection until the following day. Even then, there was no motion for mistrial [R.T. 353-54, 390] .

The jurors were instructed that "no presumption of guilt may be raised and no inferences of any kind may be drawn from the failure of a defendant to testify." [R.T. 476] . Appellant's counsel had requested an instruction in regard to the matter:

"I would prefer that the matter not be developed any further in front of the jury except by the instruction at the time the Court instructs." [R.T. 391].

E. THE COURT'S FAILURE TO CALL DR. ROBUCK AS A WITNESS DID NOT CONSTITUTE ERROR.

Appellant contends that the Court committed error by failing to call Dr. Robuck as the Court's own witness.

Appellant attempted to have Dr. Robuck's hearsay report entered into evidence. The Court asked Government counsel whether he would stipulate that the report could go in, and Government counsel replied that he would stipulate "if the jury is informed that he is a defense witness." Appellant's counsel objected to this. He later stated, "Your Honor, by no stretch of the imagination is this a defense witness." [R.T. 206-07].

The Court informed appellant that he (appellant) could call Dr. Robuck as a witness if he wished to do so [R.T. 208]. Appellant did not choose to do so.

It is evident that appellant's chief interest was in providing the jurors with the belief that the Court favored the testimony of Dr. Robuck over that of other expert witnesses in the case. When this attempt to provide an impression that the Court favored one side of the case was unsuccessful, appellant did not have sufficient confidence in Dr. Robuck's support for his position to call Dr. Robuck as a witness, even though the Court offered to tell the jurors how Dr. Robuck was appointed (i.e., by the Court's own

decision) [R.T. 207-08] .

It is respectfully submitted that the trial Judge was not required to indicate that he preferred the testimony of Dr. Robuck to the testimony of the expert witness called by one of the adversaries in the case.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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PHILLIP W. JOHNSON,
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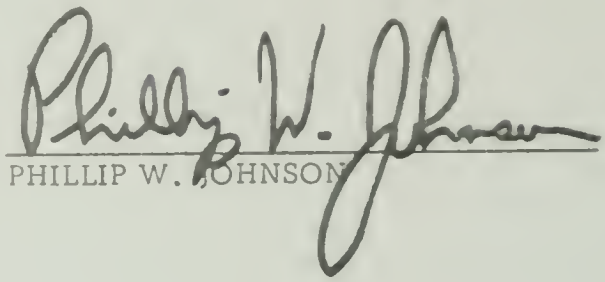
Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON